

Thomas P. Kelly III, SBN 230699
50 Old Courthouse Square, Suite 609
Santa Rosa, California, 95404-4926
Telephone : 707-545-8700
Facsimile : 707-542-3371
Email : tomkelly@sonic.net

Andrea E. Michaelsen, SBN 250826
100 E Street, Suite 203
Santa Rosa, California, 95404-4606
Telephone : 707-546-5800
Facsimile : 707-546-5806
Email : anniemichaelsen@gmail.com

Attorneys for Plaintiffs Rick Rivera Ibe & Gene Rose Ibe

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA, SANTA ROSA DIVISION

In re:

RICK RIVERA IBE
GENE ROSE MORENO IBE

Debtors.

SSN : XXX-XX-9510
SSN : XXX-XX-6420

RICK RIVERA IBE
GENE ROSE MORENO IBE

Plaintiffs,

vs.

SELECT PORTFOLIO SERVICING INC.

Defendant.

Bankruptcy Case Number: 11-12728

Chapter 13

Adversary Proceeding Number: ____-____

COMPLAINT FOR BREACH OF
SETTLEMENT AGREEMENT

Court: 99 South E Street
Santa Rosa, California
95404

I. INTRODUCTION

Plaintiffs Rick Rivera Ibe & Gene Rose Ibe (hereinafter “Plaintiffs”) presents this action for breach of two prior settlement agreements for violations of the Discharge Injunction under 11 U.S.C. §524 entered into between Plaintiffs and Defendant Select Portfolio Servicing Inc.. (Hereinafter “Defendant”).

As discussed in greater detail below, Plaintiffs have twice filed adversary proceedings against Defendant for ongoing violations of the Discharge Injunction both of which were settled out of court. Despite these prior actions, and despite these prior settlement agreements, and with full knowledge of the application of the Discharge Injunction under 11 U.S.C. §524, Defendant continued to send notices and statements to Plaintiffs in a deliberate, intentional, and purposeful breach of the prior settlement agreements.

II. PARTIES

1. Plaintiffs Rick Rivera Ibe & Gene Rose Ibe are an individuals and the debtors in that Chapter 13 Bankruptcy case filed with the Northern District of California, Santa Rosa Division, bearing case number 11-12728 and were the Plaintiffs in those adversary proceedings filed with the Northern District of California, Santa Rosa Division bearing case name *Ibe vs. Select Portfolio Servicing, Inc.* and bearing case numbers AP 16-01112 and AP 17-01020. Plaintiffs can be served with process via mail sent to their attorneys of record, Thomas P. Kelly III, 50 Old Courthouse Square, Suite 609, Santa Rosa, California, 95404 and Andrea E. Michaelsen, 100 E Street, Suite 203, Santa Rosa, California, 95404-4606.

2. Defendant Select Portfolio Servicing Incorporated is a Utah Corporation bearing entity number 1026229-0142 with a principal place of business in Salt Lake City, Utah and can be served with process via mail to it’s registered agent for service of process in the State of California which is CSC-Lawyers Incorporating Service, 2710 Gateway Oaks Drive, Suite 150N, Sacramento, California, 95833 and also through its registered agent for service of process in the State of Utah which is Jason H. Miller, 3217 South Decker Lake Drive, Salt Lake City, Utah, 84119.

1 **III. JURISDICTION AND VENUE**

2 3. This present adversary proceeding is one arising in Plaintiffs bankruptcy case
3 bearing case number 11-12728 filed with this Court, and arising under Chapter 13 of Title 11 of
4 the United States Code.

5 4. This Court has jurisdiction over this adversary proceeding pursuant 28 U.S.C. §
6 157 and 28 U.S.C. § 1334.

7 5. This is a core proceeding as defined in 28 U.S.C. § 157(b).

8 6. This adversary proceeding is brought pursuant to 11 U.S.C. §524.

9 7. Venue properly lies in this judicial district pursuant to 28 U.S.C. §1409(a) as
10 the present adversary proceeding is related to and arising from Plaintiff's Chapter 13 Bankruptcy
11 Case arising under Title 11 of the United States Code which is before this Court.

12 8. Venue properly lies before in this judicial district pursuant to 28 U.S.C. §1409(a)
13 as it arises from prior adversary proceedings AP 16-01112 and AP 17-01020 filed with this
14 Court as related to and arising from Plaintiffs Chapter 13 Bankruptcy Case arising under Title 11
15 of the United States Code which is before this Court.

16 **IV. RELEVANT FACTS**

17 9. On July 19, 2011, Plaintiffs filed a voluntary Chapter 13 bankruptcy petition in
18 the United States Bankruptcy Court for the Northern District of California bearing case number
19 11-12728. (Hereinafter "Bankruptcy Case").

20 10. One of the scheduled debts in the Bankruptcy Case was for a secured debt in the
21 amount of \$164,727.54 owed against that property located at 202-A Allen Richard Court,
22 Moncks Corner, South Carolina, 29461. (Hereinafter "Property").

23 11. On August 21, 2015 Defendant filed a motion for relief from stay in Plaintiffs
24 bankruptcy case as to the Property (See docket entry number 31 in the Bankruptcy Case) and
25 which was granted on September 11, 2015. A copy of this order is attached hereto and marked as
26 Exhibit A. (See also docket entry number 31 in the Bankruptcy Case).

27 12. This order did not grant Defendant permission to engage in any conduct other
28 than to conduct a foreclosure on the Property and send those notices necessary to "comply with

1 California Civil Code Section 2923.5.” (See Exhibit A, page 2).

2 13. On October 14, 2016, the Plaintiffs were granted a discharge of all dischargeable
3 debts pursuant to 11 U.S.C. § 524. (See docket entry number 44 in the Bankruptcy Case).

4 14. On November 14, 2016, with full knowledge of Plaintiffs bankruptcy case,
5 Defendant sent a demand letter to Plaintiffs for payment of the discharged debt on the Property
6 in the amount of \$52,095.86.

7 15. As a result of this attempt to collect a discharged debt, on December 15, 2016
8 Plaintiffs initiated an adversary proceeding against Defendant bearing case name *Ibe vs. Select*
9 *Portfolio Servicing, Inc.* and case number AP 16-01112. A copy of the complaint in this
10 adversary proceeding is attached hereto and marked as Exhibit B. (See also docket entry number
11 51 in the Bankruptcy Case and Docket entry 1 in AP 16-01112).

12 16. While this adversary proceeding was pending, Defendant continued to contact
13 Plaintiffs in violation of the Discharge Injunction under 11 U.S.C. §524. These contacts included
14 the following documents:

15 A. December 15, 2016 - statement of account stating the total amount owed
16 on the account is \$160,781.08, including a section entitle “Delinquency
17 Notice” with the statement “You must pay this amount to bring your loan
18 current.” (See attached Exhibit C).

19 B. January 13, 2017 - statement of account stating the total amount owed on
20 the account is \$161,236.25, including a section entitle “Delinquency
21 Notice” with the statement “You must pay this amount to bring your loan
22 current.” (See attached Exhibit D).

23 C. February 15, 2017 - statement of account stating the total amount owed on
24 the account is \$160,633.33. (See attached Exhibit E).

25 D. March 15, 2017 - statement of account stating the total amount owed on
26 the account is \$162,029.59. (See attached Exhibit F).

27 E. March 16, 2017 - letter stating that “[Defendant] identified that you are in
28 default under the terms of your mortgage or deed of trust (security

instrument).” (See attached Exhibit G).

F. April 3, 2017 - letter stating that “Your request for workout assistance on the above referenced account has expired.” (See attached Exhibit H).

G. April 13, 2017 - statement of account stating the total amount owed on the account is \$162,425.02. (See attached Exhibit I).

17. On April 19, 2017, Plaintiffs and Defendant reached a settlement agreement for the violations of the Discharge Injunction under 11 U.S.C. §524. A copy of this settlement agreement is attached hereto and marked as Exhibit I. (Hereinafter “First Settlement Agreement”).

18. The First Settlement Agreement was identified as confidential pursuant to Paragraph L. However, the confidentiality does not apply where it is “(vi) necessary to enforce the terms of this Agreement.” (See Exhibit I, page 3, ¶L).

19. As a provision of the First Settlement Agreement, Defendants paid Plaintiffs \$3,000.00 as damages and Plaintiffs agreed to dismiss the pending adversary proceeding. To fulfill that requirement, Plaintiffs entered a voluntary dismissal on May 8, 2017. (See docket entry 15 in the record of AP 16-01112).

20. Only a week later on May 15, 2017, and despite having notice of the bankruptcy case, and despite having been sued in an adversary proceeding, and despite having paid \$3,000.00 to settle the prior violations, Defendant again continued to contact Plaintiffs in violation of the Discharge Injunction under 11 U.S.C. §524. These contacts included the following documents:

H. May 15, 2017 - statement of account stating the total amount owed on the account is \$162,893.12. (See attached Exhibit K).

I. June 6, 2017 - letter stating that “Your interest rate is scheduled to change again on January 1, 2018 with a corresponding payment change on February 1, 2018.” This also includes a demand for payment of the discharged debt in the amount of \$96,292.42, an increase from the previous demand of \$52,095.86. (See attached Exhibit L).

1 J. June 15, 2017 - statement of account stating the total amount owed on the
2 account is \$163,404.89. (See attached Exhibit M).

3 21. As a result of these continuing attempts to collect a discharged debt, on July 6,
4 2017 Plaintiffs initiated a second adversary proceeding against Defendant bearing case name *Ibe*
5 *vs. Select Portfolio Servicing, Inc.* and case number AP 17-01020. A copy of the complaint in
6 this adversary proceeding is attached hereto and marked as Exhibit N. (See also docket entry
7 number 54 in the Bankruptcy Case and Docket entry 1 in AP 17-01020).

8 22. While this second adversary proceeding was pending, Defendant continued to
9 contact Plaintiffs in violation of the Discharge Injunction under 11 U.S.C. §524. These contacts
10 included the following documents:

11 K. July 14, 2017 - statement of account stating the total amount owed on the
12 account is \$164,004.83. (See attached Exhibit O).

13 L. August 15, 2017 - statement of account stating the total amount owed on
14 the account is \$164,778.96. (See attached Exhibit P).

15 M. September 7, 2017 - letter stating that “Defendant identified that you are
16 in default under the terms of your mortgage or deed of trust (security
17 instrument).” (See attached Exhibit Q).

18 23. On August 22, 2017, Plaintiffs and Defendant reached a settlement agreement for
19 the violations of the Discharge Injunction under 11 U.S.C. §524. A copy of this settlement
20 agreement is attached hereto and marked as Exhibit R. (Hereinafter “Second Settlement
21 Agreement”).

22 24. The Second Settlement Agreement was identified as confidential pursuant to
23 Paragraph L. However, the confidentiality does not apply where it is “(vi) necessary to enforce
24 the terms of this Agreement.” (See Exhibit L, page 3, ¶L).

25 25. As a provision of the Second Settlement Agreement, Defendants paid Plaintiffs
26 \$4,000.00 as damages and Plaintiffs agreed to dismiss the pending adversary proceeding. To
27 fulfill that requirement, Plaintiffs entered a voluntary dismissal on September 9, 2017. (See
28 docket entry 8 in the record of AP 17-01020).

1 26. Once again, only six days later on September 15, 2017, and despite having notice
2 of the bankruptcy case, and despite have been sued twice previously in adversary proceedings,
3 and despite having paid \$7,000.00 to settle the prior violations, Defendant again continued to
4 contact Plaintiffs in violation of the Discharge Injunction under 11 U.S.C. §524. These contacts
5 included the following documents:

6 N. September 15, 2017 - statement of account stating the total amount owed
7 on the account is \$165,318.64. (See attached Exhibit S).

8 O. October 13, 2017 - statement of account stating the total amount owed on
9 the account is \$165,892.88. (See attached Exhibit T).

10 P. November 15, 2017 - statement of account stating the total amount owed
11 on the account is \$166,386.81. (See attached Exhibit U).

12 Q. November 24, 2017 - letter stating that a foreclosure sale for the Property
13 is set for January 3, 2018. (See attached Exhibit V).

14 R. December 6, 2017 - letter stating that “Your interest rate is scheduled to
15 change again on January 1, 2018 with a corresponding payment change on
16 February 1, 2018.” (See attached Exhibit W).

17 S. December 15, 2017 - statement of account stating the total amount owed
18 on the account is \$169,001.71. (See attached Exhibit X).

19 T. December 18, 2017 - letter stating that lender-placed insurance had been
20 placed on the Property and that “If Defendant has to purchase a
21 policy/certificate on your behalf, you will be responsible for the cost of
22 the policy/certificate beginning from the date the insurance is placed..”
23 (See attached Exhibit Y).

24 U. December 21, 2017 - letter identifying a single point of contact for the
25 mortgage as “your relationship manager.” (See attached Exhibit Z).

26 V. January 3, 2018 - letter stating that a foreclosure sale for the Property is
27 postponed to February 7, 2018. (See attached Exhibit AA).

28 W. January 9, 2018 - letter identifying a single point of contact for the

mortgage as “your relationship manager.” (See attached Exhibit BB).

X. January 11, 2018 - statement of account stating the total amount owed on the account is \$169,582.93. (See attached Exhibit CC).

Y. February 1, 2018 - letter identifying the deficiency on the escrow account for the mortgage in the amount of \$29,510.55. (See attached Exhibit DD).

Z. February 14, 2018 - statement of account stating the total amount owed on the account is \$170,005.51. (See attached Exhibit EE).

AA. February 19, 2018 - letter stating that “In the mortgage documents you signed, you agreed to keep insurance on your property at all time. Failure to do so is a breach of those requirements.” (See attached Exhibit FF).

BB. March 12, 2018 - letter stating that “Our records indicate that payments have not been made on this account as required by the mortgage documents.” (See attached Exhibit GG).

CC. March 15, 2018 - statement of account stating the total amount owed on the account is \$170,427.18. (See attached Exhibit HH).

DD. April 2, 2018 - letter stating that lender-placed insurance has been cancelled “... that was issued in compliance with your mortgage/lien agreement.” (See attached Exhibit II).

27. As set forth above, since December of 2016, Defendant has contacted Plaintiffs in writing regarding this discharged debt not less than thirty (30) times, of which seventeen (17) were after Defendant entered into both settlement agreements for exactly the same conduct which formed the basis of the adversary proceedings in the first place.

V. CAUSE OF ACTION FOR BREACH OF SETTLEMENT AGREEMENT

28. Plaintiffs hereby incorporates all allegations contained in paragraphs 1 through 27 above as though fully stated herein.

29. As a result of the filing of the petition and the discharge order in Plaintiffs bankruptcy case bearing case number 11-12728, the Discharge Injunction under 11 U.S.C. §524 was in effect.

1 30. Defendant was given notice of Plaintiffs bankruptcy filing by the Bankruptcy
2 Court on July 29, 2011 (notice of the meeting of the creditors), and on October 14, 2016 (notice
3 of the Plaintiffs discharge and final decree).

4 31. Defendant was served with and responded to both adversary proceedings in which
5 Defendant was named as a party bearing case numbers AP 16-01112 and AP 17-01020.

6 32. Defendant entered into and agreed to the First Settlement Agreement and the
7 Second Settlement Agreement in both adversary proceedings in which Defendant was named as
8 a party bearing case numbers AP 16-01112 and AP 17-01020.

9 33. As set forth above, while the discharge injunction was in effect, Defendants
10 deliberately, willfully, intentionally, and with explicit intent to collect a debt, took actions to
11 enforce a debt in violation of 11 U.S.C. §524.

12 34. Defendants took these actions with full knowledge of Plaintiffs bankruptcy case,
13 with notice from this Court, with notice of the two prior adversary proceedings, with notice of
14 the two prior settlement agreements, and did so at all times with the expressly stated intent to
15 pursue an action barred by the discharge injunction.

16 35. As this conduct was deliberate, willful, and intentional, and as a result an award
17 of punitive damages for this violation is warranted as the conduct rises to the level of malicious
18 or oppressive misconduct because Defendant was fully aware of the discharge injunction,
19 entered into prior agreements to resolve this conduct, and continued with this conduct regardless
20 of that knowledge.

21 36. The First and Second Settlement Agreement expressly authorizes the recovery of
22 attorneys fees for Plaintiffs action herein as it is an action to enforce the settlement agreements,
23 and the recovery of such fees is authorized under Paragraph J of both settlement agreements as
24 follows:

25 “If any action is brought to enforce this Agreement, or is brought in connection
26 with any dispute arising out of this Agreement or the claims which are the subject
27 of this Agreement, the prevailing Party or Parties shall be entitled to recover
28 damages, fees and other costs incurred in such litigation which they may prove
are the direct and proximate result of any breach hereof in addition to any other
relief which that Party or Parties may be entitled to by law.” (See Exhibit J, page
3, ¶J and Exhibit R, page 3, ¶J).

1 **VI. RELIEF REQUESTED**

2 WHEREFORE, Plaintiffs respectfully request the Court enter a judgment as follows:

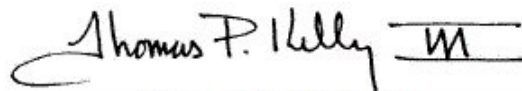
3 37. Awarding Plaintiffs damages against Defendant Select Portfolio Servicing Inc.
4 according to proof for each breach of the settlement agreements in this case to be determined by
5 this Court.

6 38. Awarding Plaintiffs punitive damages against Defendant Select Portfolio
7 Servicing Inc. for each breach of the settlement agreements in this case to be determined by this
8 Court.

9 39. Awarding Plaintiffs attorney fees and costs against Defendant Select Portfolio
10 Servicing Inc., and for those fees and costs to be determined in a separate motion after final
11 determination of this matter by the Court.

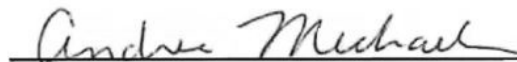
12 40. Any other relief the Court deems just and proper.

13 Dated: May 25, 2018

14 

15 Thomas P. Kelly III
16 Attorney at Law

17 Dated: May 25, 2018

18 

19 Andrea E. Michaelsen
20 Attorney at Law
21
22
23
24
25
26
27
28